SUPREME COURT OF THE UNITED STATES.

No. 75.

LESSEE OF ENOCH TUCKER AND RICHARD THOMPSON, PLAINTIFF IN ERROR,

VERSUS

ELIZA G. MORELAND.

ERROR FROM CIRCUIT COURT UNITED STATES FOR DISTRICT OF COLUMBIA.

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Writ of error.

UNITED STATES OF AMERICA, *sct.*

The President of the United States to the Judges of the Circuit Court of the United States for the District of Columbia, for the county of Washington, greeting:

[SEAL.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before

you, or some of you, between Enoch Tucker and Richard Thompson's lessee, plaintiff, and Eliza G. Moreland, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears. And we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in January next, in the said Supreme Court to be then and there held; and that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable JOHN MARSHALL, Chief Justice of said Supreme Court of the United States.

Issued this 11th day of September, 1834.

W. BRENT, *Clerk,*
Circuit Court, District of Columbia, for the county of Washington.

Citation.

UNITED STATES OF AMERICA,
District of Columbia, county of Washington, sct.

The United States of America to Eliza G. Moreland, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in January next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein Enoch Tucker and Richard Thompson's lessee is plaintiff, and you are defendant, to show cause, if any there be, why judgment rendered against the said plaintiff as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM CRANCH, Chief Justice of the circuit court for the District of Columbia.

Issued this eleventh day of September, 1834.

W. CRANCH.

Service acknowledged by THOMAS SWANN, Esq.

Copy of appeal bond.

Know all men by these presents, that we, Enoch Tucker and Richard Thompson, and William Prout, are held and firmly bound unto Eliza G. Moreland, in the full and just sum of two hundred dollors, current money, to be paid to the said Eliza G. Moreland, her heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this eleventh day of September, in the year one thousand eight hundred and thirty-four.

Whereas lately at a circuit court of the United States for the District of Columbia, sitting for the county of Washington, in a suit depending in

the said circuit court, wherein the said Enoch Tucker and Richard Thompson's lessee was plaintiff, and the said Eliza G. Moreland was defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court for the county aforesaid, to reverse the judgment in the aforesaid suit, and a citation to the said Eliza G. Moreland, citing and admonishing her to be and appear at a Supreme Court of the United States, to be held on the second Monday of January next.

Now the condition of the above obligation is such, that if the said Enoch Tucker and Richard Thompson shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

ENOCH TUCKER. [SEAL.]
R. THOMPSON. [SEAL.]
WILLIAM PROUT. [SEAL.]

Signed, sealed, and delivered in the presence of
G. W. STEVENSON.

Approved. W. CRANCH.

Copy. Test: W. BRENT, *Clerk.*

Style of court.

DISTRICT OF COLUMBIA, *sct.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty-fourth day of the same month, in the year of our Lord one thousand eight hundred and thirty-four, and of the Independence of the United States the fifty-eighth.

Present:

The Hon. { WILLIAM CRANCH, Chief Judge. / BUCKNER THRUSTON, and / JAMES S. MORSELL, } Assistant Judges.
ALEXANDER HUNTER, Esquire, Marshal.
WILLIAM BRENT, *Clerk.*

In the record of proceedings of the same court, among others are the following, to wit:

Parties.

ENOCH TUCKER and RICHARD THOMPSON's lessee
against
ELIZA G. MORELAND.

Be it remembered, that heretofore, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and thirty-three, Richard Fen, lessee of the said Enoch Tucker and Richard Thompson, by Richard S. Coxe, esquire, his attorney, declared in the circuit court here against John Den, in a plea of trespass in ejectment, with a notice thereto annexed, in manner and form following, to wit:

Nar.

"DISTRICT OF COLUMBIA, *Washington county, ss.*

"John Den was attached to answer unto Richard Fen, of a plea wherefore he the said John with force and arms, &c., and against the peace of the said United States, entered into the lots and parcels of land situate, lying, and being in the county of Washington aforesaid, and known and designated as lot number sixteen in square number two hundred and ninety, on the general plan of the city of Washington; and also all that part of lot number seventeen in said square two hundred and ninety, beginning at the northeast corner of said lot, and running thence south on twelfth street twenty-eight feet six inches, thence westwardly fifty-six feet eight inches, thence north parallel with the first line twenty-eight feet six inches, thence eastwardly fifty-six feet eight inches, to the beginning; and also all that part of lot number fifteen in the said square, beginning at the northeast corner and running thence due west twenty-nine feet eight inches, thence running due south eighty-eight feet six inches, to lot number seventeen in said square, thence with the line of the lot number seventeen east twenty-nine feet eight inches, then with the line of lots sixteen and seventeen to the place of beginning, with the appurtenances, which Enoch Tucker and Richard Thompson had demised to the said Richard for a term of years which is not yet expired, and which also the said Enoch Tucker had himself demised to the said Richard for a term of years not yet expired, and which also the said Richard Thompson had demised to the said Richard Fen, for another term of years not yet expired, and ejected, drove out, and removed him the said Richard Fen from his said farm as aforesaid, and other wrongs to the said Richard then and there did, to the great damage of the said Richard, and against the peace, government, and dignity of the United States; and thereupon the said plaintiff, by Richard S. Coxe, his attorney, complains, that whereas the said Enoch Tucker and Richard Thompson, on the eighth day of March, in the year eighteen hundred and thirty-three, at the county aforesaid, had demised unto him all the lots of ground and premises above described, situate, lying, and being in the county of Washington aforesaid, with the appurtenances, to have and to hold to him the said plaintiff from the seventh day of March, then last past, for, during, and until the full end and term of fourteen years thence next ensuing, fully to be completed and ended; and also that the said Enoch Tucker, on the said eighth day of March, in the year aforesaid, at the county aforesaid, had demised the said premises and lots of ground with the appurtenances unto him the said plaintiff, to have and to hold to him the said plaintiff from the said seventh day of March then last past, for, during, and until the full end and term of fourteen years thence next ensuing, and fully to be completed and ended; and that whereas also the said Richard Thompson, on the said eighth day of March, in the year aforesaid, at the county aforesaid, had demised the said premises and lots of ground with the appurtenances, unto him the said plaintiff, to have and to hold the same to him the said plaintiff, from the said seventh day of March then last past, for, during, and until the full end and term of fourteen years, and fully to be completed and ended. By virtue of which said several demises the said plaintiff entered into all the said premises as above described, with the appurtenances thereunto belonging, and was thereof possessed until the ninth day of the said month of March aforesaid, on which said ninth day of March he, the said John

Den, with force and arms, &c., entered into and upon the premises aforesaid, with the appurtenances, and into and upon the possession of the said plaintiff, and ejected, drove out, and removed the said plaintiff from his said possession, his said several terms not being yet ended, and kept out and still keeps out the said plaintiff from his said possession, and other wrongs then and there did, to the great damage of the said plaintiff, and against the peace, government, and dignity of the United States; wherefore the said plaintiff saith that he hath sustained damage to the value of one thousand dollars, and therefore brings suit, &c.

RICHARD S. COXE,
Attorney for Plaintiff.

JOHN DOE,
RICHARD ROE, } *Pledges, &c.*

Notice.

MADAM: I am informed you are in possession of or claim title to the premises in the foregoing declaration mentioned, or to some part thereof, and I being sued as a casual ejector in this action, and having no claim or title to the same premises, do advise you to appear in the circuit court of the District of Columbia, to be held in and for the county of Washington, at the City Hall in the city of Washington, on the "fourth Monday of March instant, and by some attorney of said court then and there, by rule of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

I am, &c. &c.,
JOHN DEN.

March 12, 1833.

To Miss ANN HEANEY.
Tenant in possession, &c., or to whom it may concern."

A copy of which said declaration and notice was made and sent to the marshal of the District of Columbia, thereon endorsed "to be served on the defendant, the tenant in possession, or set up on the premises at least days before the return thereof."

March term, 1833.—*Marshal's return.*

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-three, being the day of the return of the service of the aforegoing declaration in ejectment, comes into the circuit court here the said Richard Fen, lessee of the said Enoch Tucker and Richard Thompson, by his attorney aforesaid, and the marshal of the district aforesaid, to wit, Henry Ashton, esquire, to whom the said declaration in ejectment and notice as aforesaid was in form aforesaid made and sent, certifies his service thereof to the court here, in form following, to wit: "I hereby certify that I did, on the fourteenth day of March, in the year eighteen hundred and thirty-three, serve Ann Heaney, tenant in possession of the premises mentioned in the declaration hereto annexed, or some part thereof, with a true copy of the declaration and notice thereunder written and hereto annexed.

H. ASHTON, *Marshal.*"

Rule plea.—Appearance of Eliza G. Moreland.—Lease entry and ouster confessed.

Whereupon the *the* said Richard Fen, lessee of the said Enoch Tucker and Richard Thompson, by his attorney aforesaid, prays that the defendant in possession of the premises, or those under whom she claims, may appear and answer to the declaration aforesaid. Whereupon Eliza G. Moreland, (who claims title to the land and premises in question, or of some part thereof,) by Joseph H. Bradley, esquire, her attorney, appears in court here, and it is ruled by the court here, with the consent of the said Richard Fen, lessee as aforesaid, by his attorney aforesaid, and the said Eliza G. Moreland, by her attorney aforesaid, that the said Eliza G. Moreland be admitted defendant in the place of John Den, the casual ejector, and at the trial thereon to be had the said Eliza G. Moreland shall appear in proper person, or by attorney, and confess lease, entry, and actual ouster and expulsion, of so much of the lands in the declaration of the said Richard Fen, lessee as aforesaid, as is in the possession of the said Eliza G. Moreland, or her tenant, or of any other person claiming by or under her title; or in default thereof, that judgment be entered against the now defendant John Den, the casual ejector, but that prosecution be stayed against him until he makes default in any of the premises; and it is further ruled by the court here with the consent of the counsel that if, by reason of such default, the said Richard Fen, lessee as aforesaid, shall become nonsuit at the trial, the said Eliza G. Moreland shall take no advantage thereof, but shall pay to the said Richard Fen, lessee as aforesaid, his costs, &c.; and it is further ruled by the court here, that if, upon the trial of the said issue a verdict shall be given for the said Eliza G. Moreland, or if the said Richard Fen, lessee as aforesaid, shall not prosecute his declaration upon other cause than for the not confessing lease, entry and ouster as aforesaid, then the said Enoch Tucker and Richard Thompson, lessors of the said Richard Fen, shall pay costs, &c.; and thereupon the said Eliza G. Moreland, by her attorney aforesaid, defends the force and injury, when and so forth, and prays leave of the court here to imparle until the fourth Monday of November next, and to her it is given; the same day is given to the said Richard Fen, lessee as aforesaid, also.

November term, 1833.—Appearance of parties.—Defence on title, not guilty and issue.—Venire.

At which said fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-three, to which said day the said Eliza G. Moreland had leave to imparle, comes into the circuit court here, as well the said Richard Fen, lessee as aforesaid, by his attorney aforesaid, as the said Eliza G. Moreland, by her attorney aforesaid; and the said Eliza G. Moreland, by her attorney aforesaid, as before, defends the force and injury, when, and so forth, and takes her defence of and upon the premises in question upon her title thereto, and says that she is not guilty of the trespass and ejectment in the said declaration mentioned, in manner and form as the said Richard Fen, lessee as aforesaid, above complains, and of this she puts herself upon the country; and the said Richard Fen, lessee as aforesaid, in like manner, &c.; therefore let a jury thereon appear before the court here on the fourth Monday of March next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to said parties then and there, &c.

March term, 1834.—Jurors' names.—Jury empanneled.—Verdict for defendant.—Judgment on verdict.

And now at this day, to wit, the said fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-four, comes again into the circuit court here, as well the said Richard Fen, lessee as aforesaid, by his attorney aforesaid, as the said Eliza G. Moreland, by her attorney aforesaid. Whereupon, for trying the issue aforesaid between the parties aforesaid, it is ordered by the court here, that twelve persons, from the pannel of petit jurors returned to the court here by the marshal of the district aforesaid, be drawn by ballot according to the law in such case provided; and thereupon the twelve persons so drawn being called, come, to wit, Benjamin S. Bayly, Nathaniel Marden, John Mount, Gregory Ennis, Abner H. Young, James Owens, John Holtzman, James Summers, Paul Stevens, Matthew Hines, John P. Wingard, and Samuel Drury; who, being empanneled and sworn to say the truth in the premises, upon their oath do say, that the said Eliza G. Moreland is not guilty of the trespass and ejectment aforesaid, in manner and form as the said Eliza G. Moreland above by pleading hath alleged; therefore it is considered by the court here, that the said Richard Fen, lessee as aforesaid, take nothing by his declaration aforesaid, but for his false complaint be, in mercy, &c., and that the said Eliza G. Moreland go thereof without day, &c.: and it is further considered by the court here, that the said Eliza G. Moreland recover against the said Enoch Tucker and Richard Thompson, lessors of the said Richard Fen, the sum of nineteen dollars and forty-seven cents, for her costs and charges, by her laid out and expended in and about her defence in this behalf sustained, to the said Eliza G. Moreland, by the said court now here adjudged, &c.; and that the said Eliza G. Moreland may have execution thereof, &c.

MEMORANDUM.—Before the jurors aforesaid withdrew from the bar of the court here, the said plaintiff, by his attorney aforesaid, filed in court here the following bills of exception, to wit:

First bill of exception.

TUCKER and THOMPSON } *Ejectment.*
vs.
ELIZA G. MORELAND. }

Upon the trial of this cause it was admitted that Richard Barry was seized in fee of the lot and premises in the declaration mentioned, and being so seized, made and executed to Richard Wallach the deed for the said lot and premises, in these words to wit, (copied at page 21, &c.)

It was admitted that after the execution of the said deed the said Richard Barry continued in possession of the said lot and premises until the 8th of February, 1833, and then executed a deed for the same to the defendant, Eliza G. Moreland, which deed is duly recorded, and is in these words, to wit: (copied at page 25.)

The defendant gave in evidence this last mentioned deed, and claims title under it to the premises in question. The defendant also gave evidence tending to prove that the said defendant under the said deed took possession of the said lot and premises, and held possession of the same as of her absolute right, from the date of the said deed to the present time.

The plaintiffs gave evidence to the jury to prove that Richard Wallach, the trustee mentioned in the before mentioned deed of trust, duly advertised the sale of the lot and premises in the declaration mentioned, and sold the same to the plaintiffs on the 23d of February, 1833, and made them a deed for the same on the 7th day of March, 1833, which is in these words, (copied at page 31.)

The defendant gave evidence to prove that at the time of the sale made by Richard Wallach as aforesaid, the said defendant gave public notice of her title to the said lot and premises, and there publicly claimed the same as of her absolute right.

Upon which said evidence, so admitted and given, the counsel for the defendant prayed the court to instruct the jury, that if they believed the evidence so admitted and given as aforesaid to be true, that then they ought to find their verdict for the defendant; which instruction the court refused to give; to which refusal the defendant by her counsel excepts, and prays that this her exception may be sealed, &c; which is done accordingly this 24th of April, 1834.

W. CRANCH. [SEAL.]
JAMES S. MORSELL. [SEAL.]

In addition to the evidence herein given as aforesaid, the defendant gave evidence to the jury to prove that at the time the said Richard Barry made and executed his deed as herein before mentioned to Richard Wallach, of the 1st of December, 1831, he the said Richard Barry was an infant under the age of twenty-one years, and that at the time he made his deed to the defendant of the 8th of February, 1833, herein before mentioned, he the said Richard Barry was of full age, that is to say upwards of twenty-one years of age.

Whereupon the counsel for the defendant prayed the court to instruct the jury that if, upon the whole evidence aforesaid so given to the jury, they should believe the facts to be as stated as aforesaid, then the deed from the said Richard Wallach to the plaintiffs, as herein before mentioned, does not convey to the said plaintiffs any title which would enable them to sustain this action.

Which instruction the court gave, and to which the plaintiffs by their counsel except, and pray that their exceptions may be sealed, &c; which is done acordingly the 24th of April, 1834.

W. CRANCH. [SEAL.]
B. THRUSTON. [SEAL.]

Second bill of exception.

The said plaintiff, further to maintain and prove the issue on his side, then gave in evidence by competent witnesses facts tending to prove that the said Richard N. Barry had attained the full age of twenty-one years on the fourteenth day of September, 1831; and that in the month of November, eighteen hundred and thirty-one, the said defendant, who was the mother of the said Richard, did assent and declare that said Richard was born on the 14th day of September, 1810; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her at the period of the birth of her said son, that such birth actually occurred on the said 14th of September, 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the said birth; and upon

his informing said defendant that he was unable to testify to said fact, having lost his book of account which contained the entry, she assured him that such was the case, and brought to his recollection several contemporaneous occurrences, which satisfied him at that time that this her statement was correct and true; and said Dr. McWilliams did accordingly give a certificate and make an affidavit in the words and figures following, (copied at page 30, &c.) and that said certificate and affidavit were made in the presence and at the instance of said defendant and said Richard N. Barry in order that they might exhibit the same to the orphans' court of said county of Washington, to induce said court to bring to a final settlement the accounts of one Peter Lenox, esquire, now deceased, the executor of Richard Barry, father, and Peter W. Cook, uncle, of said Richard, and to induce said orphans' court to direct said Lenox to make a surrender by said guardian of the property of said Richard: and said certificate and affidavit were by said defendant and Richard used for the purposes aforesaid, and said Lenox did accordingly surrender said property to said Richard N., under the authority of said orphans' court, the said court having judicially recognized and acted upon said evidence, and the said Lenox having admitted, on the faith of the same, that said Richard was, in truth, born on the said 14th September, 1810.

And said plaintiff having further given evidence tending to prove that said defendant had caused suit to be instituted in said circuit court against her said son Richard on the 1st day of December, in the year 1832, in which said suit no account or cause of action of any kind was filed, but said defendant was arrested and held to bail. And the said property included in said deed from said Richard N., under which defendant claims title, included all the property included in his said deed to Richard Wallach as trustee for said plaintiff, and other property and lots in said city of Washington of great value, and that said Richard N. was the devisee and legatee of his uncle Peter W. Cook, as herein before mentioned, and as such the owner of valuable property in said city; and that said Peter Lenox was the executor, and, as such executor, had fully accounted for all the property of said Richard; and that the agent of the lessors of the plaintiff had been referred by said Richard during the negotiation of the contract in which said deed to said Richard Wallach was executed to said Lenox, for information as to the situation of the said property, and his capacity to convey the same, and that said Lenox referred to said certificate and oath of said Dr. McWilliams, as having fully satisfied him of the facts therein contained; and that said conveyance to said Wallach was received by him and accepted by said lessors of plaintiff in full faith, that said Richard was then of full age, and fully competent to convey, induced by the aforegoing circumstances and the assurances of said Richard; and did accordingly give a full consideration for the said deed of trust and the note therein mentioned, and received said note and deed as full, and the only security therefor. And that said defendant was informed by said Barry before his deed to her, that he had so conveyed said property to said R. Wallach, and subsequently and with such knowledge prevailed on said Barry to execute to her the conveyance aforesaid. And that said Richard Wallach, under the authority of the said deed to him, advertised the said property for sale, on the 8th of February, 1833, and sold the same to said lessors of plaintiff, and conveyed the same as in his said deed is mentioned. Said plaintiff, by his council, thereupon prayed the court to instruct the jury.

1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age and above the age of twenty-one years at the time of the execution of said deed to said Wallach, or if the defendant shall have failed to satisfy the jury from the evidence that said Barry was, at the said date, an infant under twenty-one years, that then the plaintiff is entitled to recover;

2. Or if the jury shall believe, from the said evidence, that if said Richard was under age at the time of the execution of said deed, that he did, after his arrival at age, voluntarily and deliberately recognize the same as an actual conveyance of his right, or during a period of several months acquiesce in the same without objection, that then said deed cannot now be impeached on account of the minority of the grantor.

3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed as to amount to a disaffirmance of the same.

4. That, from the relative positions of the parties to said deed to defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

5. That if the lessors of plaintiff were induced, by the acts and declarations of said defendant, to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt bona fide due to them and property bona fide advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant in this action to question or deny the title of said plaintiff under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practising deception, or whether said defendant from any cause wilfully misrepresented the truth.

Whereupon, the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others.

To which refusal the council for the plaintiff excepts, and this, his bill of exceptions, is signed, sealed, and ordered to be enrolled, this 29th day of April, 1834.

W. CRANCH. [SEAL.]
B. THRUSTON. [SEAL.]

Third Bill of Exceptions.

The court having refused the 2d, 3d, 4th, and 5th instructions prayed by the plaintiffs, and the council, in opening his case to the jury, contending that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury that if, from the evidenee so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion, that the said Richard was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach under whom the plaintiffs claim their title in this case, and that at the time he made his deed as hereinbefore mentioned to the defendant, he was of full age, that such last mentioned deed was a disaffirmance of his preceding deed to him the said Richard Wallach, and that in that case the jury ought to find their verdict for the defendant, and that the evidence upon which the 2d, 3d, 4th, and 5th instructions were prayed by the plaintiffs as aforesaid, which evidence is set forth in the instructions so

prayed, is not competent in law to authorize the jury to find a verdict for the plaintiffs upon any of the grounds or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion, that the said Richard Barry was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach.

Which instruction the court gave as prayed, and the counsel for the plaintiff excepts thereto, and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 29th day of April, 1834.

W. CRANCH. [SEAL.]
B. THRUSTON. [SEAL.]

Deed from R. Barry to R. Wallach, referred to in exceptions, at page 13.

This indenture made this first day of December, in the year eighteen hundred and thirty-one, between Richard N. Barry, of the city of Washington, in the District of Columbia, of the one part, and Richard Wallach, of the said city, of the other part. Whereas the said Richard N. Barry and George Bing, of the said city, now stand indebted to Tucker and Thompson, of the said city, merchant tailors, in the sum of thirty-two hundred and thirty-eight dollars, for which they have passed to the said Tucker and Thompson their joint and several promissory note, bearing date the day and year aforesaid, in favor of the said Tucker and Thompson, at six months after date, to secure the payment of which debt within twelve months from the date hereof, and the interest that may become due thereon, the said Richard Barry has agreed to execute these presents.

Now, this indenture witnesseth, that the said Richard N. Barry, in consideration of the premises, and of the sum of five dollars to him in hand paid by the said Richard Wallach, at or before the sealing and delivery hereof, the receipt of which is hereby acknowledged, has granted, bargained, and sold, aliened, enfeoffed, and confirmed, and by these presents does grant, bargain, and sell, alien, enfeoff, and confirm unto the said Richard Wallach, his heirs and assigns, the following pieces or parcels of ground in the said city, that is to say: Lot number sixteen, (16) in square number two hundred and ninety, (290;) also, all that part of lot number seventeen in the said square, beginning at the northeast corner of the said lot, and running thence south on 12th street twenty-eighth feet six inches; thence, westerly fifty-six feet eight inches; thence, north parallel with the first line twenty-eight feet six inches; thence, easterly fifty-six feet eight inches to the beginning. And also, all that part of lot number fifteen, in the said square, beginning at the northeast corner, and running thence due west twenty-nine feet eight inches; thence, running due south eighty-eight feet six inches to lot number seventeen in said square; thence, with the line of said lot seventeen east twenty-nine feet eight inches, then with the line of lots sixteen and seventeen north to the place of beginning, with the brick dwelling house, buildings, hereditaments, and appurtenances to the said piece or parcel of ground, or either of them belonging, or in any way appertaining. To have and to hold the said pieces or parcels of ground and premises with the appurtenances unto the said Richard Wallach, his heirs and assigns, to his and their use forever upon the trusts, nevertheless hereinafter expressed, that is to say: In trust that the said Richard Wallach, or his heirs shall, in case the said debt or any part thereof shall remain unpaid ten days after the first day of December next,

sell and dispose of the said pieces or parcels of ground and premises with the appurtenances, at public or private sale for cash, or on credit as he or they may deem best, and do and shall apply the money arising from such sale (after deducting all costs and expenses of sale and other expenses of executing this trust, and retaining a commission of five per centum on the amount of sales for his or their trouble) to the payment of the said debt with all interest thereon, the surplus, if any, to be paid over to the said Richard N. Barry, his executors, administrators, or assigns, and upon the further trust to convey the said pieces or parcels of ground and premises, with the appurtenances in fee to the purchaser or purchasers. And the said Richard N. Barry, for himself, and his heirs hereby covenants to, and with the said Richard Wallach, his heirs and assigns, in manner following, that is to say: That he, the said Richard N. Barry, and his heirs, shall and will at his and their own cost and expense, keep at all times until the full payment of the said debt, the brick dwelling house and all other improvements now being in or upon the said pieces or parcels of ground, or either of them, well and sufficiently secured against loss and damage by fire, at some reputable insurance office or offices within the said District, in a sum not less than twenty-five hundred dollars, and shall and will from time to time assign, transfer, and set over the policy and policies of insurance unto the said Richard Wallach, his heirs and assigns, upon trust to receive all moneys which may become payable thereon, and apply, the same when received, to the payment of the said debt, and further, that he, the said Richard N. Barry, and his heirs shall and will at any and at all times hereafter, upon the request and at the cost and charge of the said Richard Wallach, his heirs or assigns, make and execute to the said Richard Wallach, his heirs or assigns, any and every other act or deed for the property hereinbefore mentioned, that may be deemed legally or equitably necessary for the more fully and securely vesting and confirming a title in fee to the same, in the purchaser or purchasers thereof under these presents, or for carrying into complete effect the object of the present trust.

In witness whereof, the said Richard N. Barry has hereto set his hand and affixed his seal the day and year first herein before written.

RICHARD N. BARRY. [SEAL.]

Signed, sealed, and delivered in presence of
B. K. MORSELL,
JNO. CHALMERS.

DISTRICT OF COLUMBIA, *Washington County, to wit:*

Be it remembered, that on this first day of December, 1831, before us, the subscribers, two justices of the peace in and for said county, personally appears the said Richard N. Barry, and acknowledges the foregoing deed or instrument of writing to be his act and deed.

Acknowledged before and certified by us,

B. K. MORSELL, *J. P.*
JNO. CHALMERS, *J. P.*

Deed from R. N. Barry to Eliza G. Moreland, referred to in exceptions, at page 13.

This indenture made this eighth day of February, in the year of our Lord eighteen hundred and thirty-three, between Richard N. Barry, of

the city of Washington, and District of Columbia, of the one part, and Eliza G. Moreland, of the same place, of the other part, witnesseth, that in consideration of the sum of eleven hundred and thirty-eight dollars and sixty-one cents, which he the said Richard N. now owes to the said Eliza G., for the recovery of which the said Eliza G. has instituted suit against him the said Richard, in the circuit court of the United States for the District of Columbia, and of other sums of money by the said Eliza G. to him the said Richard from time to time paid and advanced, a particular account whereof hath not been kept, amounting in the whole to a large sum of money, and for the further consideration of five dollars to him the said Richard N. by her, the said Eliza G., in hand paid, at or before the sealing and delivery hereof, the receipt whereof he doth hereby acknowledge, he the said Richard N. Barry hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said Eliza G. Moreland, her heirs and assigns, all the hereinafter described lands and all the estate, right, title, interest, claim, and demand of him the said Richard N. Barry, of, in, to, and out of the same, and every part and parcel thereof, beginning therefor as follows, that is to say: All that portion of land described as within the metes and bounds following, being portion of the square, numbered two hundred and ninety, as the same is marked and laid down on the ground plan of the city of Washington, in which said city the said land lieth, beginning therefor at the northeast of said square, and running thence due west twenty-nine feet eight inches to a portion of the said lot heretofore sold to Thomas W. Pairo; then running with the line of the same due south eighty-eight feet six inches to the lot No. 17; then with the line of the lot No. 17, east 29 feet 8 inches; then with lot 17 and 16 north to the place of beginning. And also, all the lot numbered sixteen in the said square, containing together six thousand twenty-five square feet six inches, and fronting on North F street eighty-six feet four inches, and on 12th street west, sixty feet. And also, all that part of lot numbered seventeen, in square two hundred and ninety, in the said city of Washington, beginning at the northeast corner of said lot, and running thence south on 12th street west, twenty-eighth feet six inches; thence, westerly fifty-six feet eight inches; thence, north parallel with the first line twenty-eight feet six inches; thence, easterly fifty-six feet eight inches to place of beginning, containing one thousand (1615) six hundred and fifteen square feet more or less. And also, all that part of lot numbered four, in square numbered four hundred and sixty, in the said city of Washington, being the western part or portion thereof, and bounded as follows, beginning at a point in the line of Pennsylvania Avenue twenty-five feet eleven inches and a half inch from the southeastern corner of said lot, numbered four, and running thence with the line of said avenue twenty-five feet eleven inches and one half inch (25 feet 11½ inches) to the southwestern corner of said lot; thence, in a line perpendicular to the line of said avenue thirty-six feet seven inches; thence, due north thirty-nine feet ten inches to the line of C street; thence, with the line of said C street due east, twenty-seven feet four inches; thence, due south until meeting a line perpendicular to the line of Pennsylvania Avenue from the point of beginning; and thence, forty-five feet nine inches in a line perpendicular to the line of Pennsylvania Avenue to the point of beginning. And also, all that part of lot numbered five, in square numbered four hundred and thirty-one; (431,) (No. 5,) containing four thousand five hundred and eighty-one square feet, together with all and singular the rights, privileges, ap-

purtenances, and improvements to the said lots, pieces, or parcels of land, and to each and every of them belonging, or in any wise appertaining, together with the rents, issues, and profits, and the reversions and remainders therein, and all the legal and equitable estate and interest of the said Richard N. Barry, of, in, and to the same. To have and to hold the said lots, pieces, or parcels of land and premises unto the said Eliza G. Moreland, her heirs and assigns, to her and their use and benefit forever.

And the said Richard N. Barry doth for himself, his heirs, executors, and administrators, covenant, grant, and agree to and with the said Eliza G. Moreland, her heirs and assigns, the said land and premises unto the said Eliza G. Moreland, her heirs and assigns forever, to warrant and defend against him the said Richard N. Barry, and against all and every person or persons claiming, or to claim by, through, or under him the Richard N. any interest, title, or estate in or to the above described, bargained, and sold lands. And further, that he, the said Richard N., hath good right and lawful authority to sell and convey the said lands and premises, any deed or instrument of writing made or purporting to have been made, at any time heretofore by the said Richard N. to the contrary thereof notwithstanding.

In testimony whereof, the said Richard N. Barry hath hereunto set his hand, and affixed his seal the day and year first above written.

RICHARD N. BARRY. [SEAL.]

Signed, sealed, and delivered in the presence of
JNO. CHALMERS,
B. K. MORSELL.

DISTRICT OF COLUMBIA, *Washington County, sct.*

Personally appears on this 8th day of February, in the year eighteen hundred and thirty-three, before us the subscribers, two justices of the peace for the county aforesaid, Richard N. Barry, party grantor in the foregoing deed or instrument of writing mentioned, and acknowledges the same to be his act and deed.

JNO. CHALMERS, *J. P.*
B. K. MORSELL, *J. P.*

Certificate of Dr. McWilliams, referred to in exceptions, at page 16.

WASHINGTON, *D. C. November 2nd,* 1831.

SIR: This is to certify that I was with Mrs. Eliza Barry, mother of Richard N. Barry, during her confinement with him, the 14th September, 1810.

ALEX. McWILLIAMS.

Hon. Judge CHASE.

DISTRICT OF COLUMBIA, sct. *Washington County, to wit:*

On this 2d day of November, 1831, came before the subscriber, a justice of the peace for the county aforesaid, Alexander McWilliams, of the said county, and made oath on the Holy Evangels of Almighty God, that he knows Richard N. Barry, the son of the late Richard Barry, deceased, and that he knows that the said Richard N. Barry was *born on the 14th September,* 1810, that he attended Mrs. Eliza Barry, the wife of the said Richard, in her said confinement.

Sworn before CLEMENT T. COOTE. *J. Peace.*
True copy. Test: HENRY C. NEALE, *Reg. Wills.*

Deed from R. Wallach to Tucker & Thompson, referred to in exceptions, at page 14.

This indenture made this seventh day of March, in the year eighteen hundred and thirty-three, between Richard Wallach, of the city of Washington, of the one part, and Enoch Tucker, of the said city, and Richard Thompson of the said city, of the other part. Whereas Richard N. Barry, of the said city, by an indenture bearing date the first day of December, in the year eighteen hundred and thirty-one, and made between him the said Richard N. Barry, of the one part, and the said Richard Wallach, of the other part; recorded in Liber W. B. No. 38, folios 419, 420, 421, and 422, one of the Land Records of Washington county, in the District of Columbia, conveyed the hereditaments and premises hereinafter described to the said Richard Wallach, his heirs and assigns, upon certain trusts by said indenture declared, for the purpose of securing the payment of a certain promissory note in the said indenture mentioned. And whereas, the said promissory note in said indenture mentioned became due and payable on the fourth day of June, in the year eighteen hundred and thirty-two, and the same remaining wholly unpaid, the said Richard Wallach at the request of the said Enoch Tucker and Richard Thompson, the payers and holders thereof, did, under the authority of the said indenture, expose the said hereditaments and premises to sale at public auction on the twenty-third day of February, in the year eighteen hundred and thirty-three, having first given due notice of the time and place of said sale, by advertisement inserted in the National Intelligencer, a newspaper printed and published in the said city; at which said sale the said Enoch Tucker and Richard Thompson being the highest bidders became the purchasers thereof, at and for the sum of two thousand dollars.

Now, this indenture witnesseth, that the said Richard Wallach in consideration of the premises, and of the sum of five dollars to him in hand paid by the said Enoch Tucker and Richard Thompson, at or before the sealing and delivery hereof, the receipt of which is hereby acknowledged, has bargained, sold, and conveyed, and by these presents does bargain, sell, and convey unto the said Enoch Tucker and Richard Thompson, their heirs and assigns, the following pieces or parcels of ground in the said city, that is to say: Lot number sixteen, (16) in square number two hundred and ninety, (290;) also, all that part of lot number seventeen, (17) in said square; beginning at the northeast corner of said lot, and running thence south on Twelfth street twenty-eight feet six inches; thence, westerly fifty-six feet eight inches; thence, north parallel with the first line twenty-eight feet six inches; thence, easterly fifty-six feet eight inches to the beginning. And also, all that part of lot number fifteen, (15) in the said square, beginning at the northeast corner and running thence due west twenty-nine feet eight inches; thence, due south eighty-eight feet six inches, to lot number seventeen (17) in said square; thence, with the line of said lot (17) east twenty-nine feet eight inches; thence, with the line of lots sixteen (16) and seventeen (17) north to the place of beginning, with the brick dwelling house, buildings, hereditaments, and appurtenances to the said pieces or parcels of ground or either of them belonging, or in any way appertaining. To have and to hold the said pieces or parcels of ground and premises with the appurtenances unto the said Enoch Tucker and Richard Thompson, their heirs and assigns, to their use and behoof forever as tenants in common and not as joint tenants. And the said Richard Wallach, for himself, his heirs, executors, and adminis-

trators, hereby covenants to and with the said Enoch Tucker and Richard Thompson, their heirs and assigns, that he has not at any time or times heretofore made, done, committed, or wittingly or willingly permitted or suffered any act, deed, matter, or thing, whereby, or by means whereof, the said pieces or parcels of ground and premises, or any part thereof, are, is, can, or may be charged, impeached, or incumbered in title, estate, or otherwise howsoever.

In witness whereof, the said Richard Wallach has hereto set his hand and seal the day and year first before written.

RICHARD WALLACH, [SEAL.] *Trustee.*

Signed, sealed, and delivered in the presence of
HENRY WERTZ,
B. K. MORSELL.

DISTRICT OF COLUMBIA, *Washington County, sct.*

Be it remembered, that on this seventh day of March, 1833, before us, the subscribers, two justices of the peace in and for said county, personally appears the said Richard Wallach, trustee above named, and acknowledged the foregoing deed or instrument of writing to be his act and deed.

HENRY WERTZ, *J. P.*
B. K. MORSELL, *J. P.*

Test: W. BRENT, *Clerk.*

And whereas afterwards, to wit, on the eleventh day of September, in the year of our Lord one thousand eight hundred and thirty-four, the said Enoch Tucker and Richard Thompson, by their attorney aforesaid, produced and filed in court here, the United States writ for the correcting of errors of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the county of Washington; and, in pursuance thereof, and according to the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereto annexed, is hereby transmitted to the Supreme Court accordingly.

In testimony whereof, I hereunto subscribe my name, and affix the [L. S.] seal of the said circuit court, for the county aforesaid, at the city of Washington, this 26th day of December, 1834.

W. BRENT, *Clerk.*

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

At the Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the Massachusetts District, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and thirty four.

Before the Honorable

JOSEPH STORY, *Associate Justice.*
JOHN DAVIS, *District Judge.*

Samuel D. Harris, Richard D. Harris, Charles Harris, Henry Harris, Gentlemen, Mary Harris, Charlotte Harris and Amelia Augusta Harris, Singlewomen, all of Boston, in the District of Massachusetts, Thomas Harris, John Harris, Gentlemen, of Charlestown, in said District, Henry Colman, Clerk, of Greenfield, in said District, and Mary, his wife, in her right, all citizens of and resident within the said District of Massachusetts, Plaintiffs, versus, Jesse D. Elliot, of Carlisle, in the District of Pennsylvania, (and a citizen of said District) Esquire, now commorant at Charlestown, in the said District of Massachusetts, Defendant, in a plea of Trespass, for that said Jesse, at said Charlestown, on the eleventh day of September, instant, with force and arms, broke and entered a certain close of the Plaintiffs, situate in said Charlestown, measuring four hundred feet in length and forty feet in width, formerly called Henley Street, and bounded on all sides by land of the United States, and then and there broke up and injured the soil of said close, and expelled and put out the Plaintiffs from the possession, use and occupation of said close, and kept and continued them so expelled and put out for a long space of time, to wit, from thence, hitherto :—Whereby the Plaintiffs for and during all that time lost and were deprived of the use and benefit of said close.—Also, for that said Jesse, at said Charlestown, on the eleventh day of September, instant, with force and arms, broke and entered a certain other close of the Plaintiffs, in said Charlestown, measuring seven hundred and fifty feet in length and forty feet in width, formerly called Battery or Water

street, and bounded on all sides by land of the United States, and then and there turned up and injured the soil of said close, and expelled and put out the Plaintiffs from the possession, use and occupation of said close and kept and continued them so expelled and put out for a long space of time, to wit, from thence, hitherto:—Whereby the Plaintiffs for and during all that time lost and were deprived of the use and benefit of said close, to the damage of the said Samuel, Richard, Charles, Henry, Mary, Charlotte, Amelia, Thomas, John, Henry and Mary the sum of one thousand dollars. This action was entered at the October term of this Court, A. D. 1833, when both parties appeared, and the cause was continued from thence to the May Term, A. D. 1834, and thence to this present Term. And now the said Elliot, by his Attorney, Andrew Dunlap, comes and defends the force and injury, when and where, &c. and (reserving the liberty to give any special matter in evidence) says that he is not guilty of said trespass, in manner and form as the Plaintiffs have above declared against him, and of this he puts himself on the Country.—And the Plaintiffs, by their Attorney, William Minot, (agreeing to the reservation in the Defendant's plea) do the like.—And now, also, the following Statement, having been agreed to by the parties, is exhibited in this cause and filed in Court.

STATEMENT OF FACTS.

That in the year 1780 a committee appointed by the town of Charlestown, in the county of Middlesex, in the state of Massachusetts, projected certain streets in said town and laid them down on a map or plan, which was deposited and now remains in the office of the Secretary of State of the Commonwealth of Massachusetts; and on the thirtieth day of October, 1781, the legislature of said Commonwealth passed an Act confirming the doings of said committee and barring actions in certain cases, therein specified. The street now called Water street (being the most southerly street on said plan) was not in fact entirely laid out by

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said town until the year 1795 or 1796, (a street commonly called Battery street, which ran in the same direction being used as a high-way until that time) and that the most northerly street on said plan, called Henly or Meeting-House street was not in fact laid out by said town until the year 1798 or 1799.

That John Harris, late of said Charlestown, merchant, deceased, purchased several parcels of land in said Charlestown, viz. one parcel of Andrew Newell, by deed duly executed on the 11th day of January, 1791, described as follows, a tract of land containing five acres more or less, bounded southwesterly on land of Joseph Barrell; northwesterly on a road leading to the Brick Kilns; northeasterly on a high-way leading from the Battery to Moulton's Point; southeasterly on Charles river down to low water mark; saving and reserving a high-way through the same from the Battery to Moulton's Point.—Another parcel of land of Joseph Barrell, by deed duly executed on the 16th of June, 1792, viz. a certain piece of land, bounded and measuring as follows, viz. front on Battery street, S. S. E. there measuring one hundred and seventy seven feet; upon land of Andrew Newell, E. N. E. four hundred and fifty eight feet; upon Back lane, N. N. W. one hundred and eighty four feet; upon land of the heirs of Joseph Leman, Esq. W. S. W. four hundred and fifty feet; then turning upon said Leman's land, W. S. W. fifty seven feet, till you come into Battery street. Also a part of a wharf and land upon Battery street opposite to where the cellar stands, on said lane, measuring upon Battery street, N. N. W. one hundred and fourteen feet; on Charles river, S. S. E. and continues the same breadth to low-water mark, or however otherwise bounded, or be the same measure more or less, together with all the rights, privileges and appurtenances to said granted land and premises.—Another parcel of land of John Larkin, by deed duly executed, 6th July, 1793, viz. a certain parcel of land containing about one acre and one half, bounded on land of John Harris, W. S. W. on said Harris, southerly, on land of Capt. Thomas Edes,

southerly ; on land of Capt. Thomas Harris and Amos Sampson, W. S. W. on Back lane, N. N. W. on John Harris, formerly Joseph Barrell, Esq. E. N. E. to Battery street.—Another parcel of land of David Munroe, by deed duly executed on the third day of April, 1793, viz. a piece of land containing by estimation about one eighth of an acre, butted and bounded as follows, viz. easterly and northerly by land formerly of Edward Wilson, but lately Lemmon ; westerly by land formerly of Col. John Phillips and lately owned by Benjamin Wheeler, deceased, and southerly by the street or high-way called Wapping street, or however otherwise bounded or reputed to be bounded. The above described parcels of land comprise the two parcels of land described in the writ and are parts of the land covered by said streets as laid down on said plan and afterwards laid out.

The said town of Charlestown in the year 1795 and 1796 laid out the easterly part of the southerly high-way on said plan (now called Water street) over a part of the former Battery street, and a part of the land of said John Harris, conveyed to him as above described, and the said John Harris, by the award of referees, dated July 25, 1796, received from said town a part of the land forming the old (Battery) street and the sum of four hundred fifty dollars in damages for taking his land over which said high-way passed. The following is a copy of said award.

The subscribers, referees chosen to determine a difference between the town of Charlestown on one part, and John Harris, of said Charlestown, merchant, on the other part, pursuant to a law for amending the streets of said town, laid waste by fire by the British troops, have met and fully heard the parties, and viewed the premises, and considered the disadvantage to the said John Harris' lots on the street, leading from the swing bridge to the place of the old battery, in said Charlestown, (so far as the same has not been heretofore settled) by taking a part of said lots into the street, and also the advantage derived to said lots by discontinuing the old street,

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where it does not make a part of the present street, and also the advantage of the new street being more wide, commodious and direct, than the old street was—Do award that the said town of Charlestown do pay to the said John Harris the sum of $450 and relinquish all claims to that part of the old street, which comes within said lots, as they are left by the said new street. The lots considered extend on the northwest side of the street, from the northeast corner of Thomas Edmands, formerly Henley's, to a place marked on the plan by the word "stump," being on the plan a corner of a street proposed to lead to the Meeting House, but not yet opened.—The town of Charlestown are to pay the cost of the referees, and the tavern bill of the house where they set.—Done at Charlestown, the 25th day of July, A. D. 1796.

JAMES WINTHROP,
MATTHEW CLARK,
AMOS BOND,
} *Referees.*

That in the year 1798 or 1799, the said town of Charlestown laid out the most northerly street or highway, marked on said plan, called Meeting House or Henley street, through and over the land of said John Harris, conveyed to him as above recited, and on the said John Harris received from the said town of Charlestown the sum of in damages for taking the land belonging to him, over which said street last mentioned passed.

That in the year 1800 the Government of the United States, under the authority of the Statute of Massachusetts, passed June 17, 1800, purchased of said John Harris several parcels of land in said town of Charlestown, which are now included within the limits of the Navy Yard in said town. The value of the land so taken was ascertained by the verdict of a Jury (agreeably to the provisions of said statute.) And on the 29th Nov. 1800, and 6th Feb. 1801, said Harris received from the United States the sums so ascertained, as the value of said lands.

The proceedings in ascertaining the value of said lands were as follows.

COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Court of General Sessions of the Peace begun and held at Concord, in and for the County of Middlesex, on Monday next preceding the second Tuesday of September, A. D. 1800.

The petition of Aaron Putnam, Agent of the United States of America respectfully sheweth that your petitioner having been directed by the Government of the United States to purchase a certain tract of land in Charlestown for a Navy and Dock Yard for the United States and not being able to agree with Mr. John Harris, of said Charlestown, for sundry lots of land belonging to him, which lots are within the limits pointed out by the Government. Your petitioner therefore prays that the Honourable Court would order the Sheriff of said county to summon a Jury to appraise and value said lots or tracts of land that the United States may possess the same at a fair and equitable value agreeably to a law of the said Commonwealth in that case made and provided.

Sept. 11, 1800. AARON PUTNAM,
Agent for the U. S.

Oct. 22, 1830, A Copy,
Attest, A. BIGLOW, *Clerk.*

Middlesex, ss. 4th Oct. 1800.

We the Jury empannelled and sworn as before certified having been shown several lots of land, which belong to John Harris, of Charlestown, in the county of Middlesex, merchant, lying within the limits mentioned in the Act in this case made and provided, and fully heard the said Harris; as well as Aaron Putnam, Esquire, Agent for the United States, together with the testimony by them respectively produced touching the value of the said lots, we have set out the said lots by metes and bounds, and do appraise and value the same as follows, viz. one lot containing five acres, two quarters and thirty five rods, bounded as follows, beginning at the northerly corner of Amos Samson's land by the lane which leads to the brick yards, thence run-

ning southerly, as the fence now stands, partly by land of the said Samson, and partly by land of Thomas Harris to the street lately laid out from the Meeting House to Charles river, thence running easterly on the same street until it comes to a cedar post marked, with stones about it; thence running in the same direction to a stake and stones; thence running northerly on a straight line to a post in the fence, with the top hewn on all sides; thence running still northerly, as the fence now stands, to the lane first mentioned; thence running westerly by the same lane to the place first mentioned, which same tract of land on our oaths we do appraise and value at thirteen thousand dollars and no more.

Also, one other lot of land, with the appurtenances, containing one half of an acre, bounded as follows, viz. beginning at a stake and stones, by the street lately laid out from the Meeting House to Charles river, thence running southerly by land of Thomas Edes, until it comes to a post in the southeasterly corner of said Edes' fence by Battery street, thence running northerly by the same street till it comes to a stake and stones standing where the same street meets the street lately laid out as aforesaid; thence running southwesterly by the same street to the stake and stones first mentioned; which same tract and lot of land we do on our oaths appraise and value at thirteen hundred dollars and no more.

Also, one other lot of land, containing one acre and two quarters, more or less, bounded as follows, viz. beginning at a stake and stones, where Wapping street and Battery street intersect each other; thence running northeasterly by Battery street, to a stake and stones by land claimed by the said Edes, and in dispute between him and the said Harris; thence running southeasterly by the same land to low-water mark; thence running southwesterly by low-water mark till it comes to Wapping street aforesaid; thence westerly by the same street to the stake and stones first mentioned, which same tract of land we do on

our oaths appraise and value at one thousand five hundred dollars and no more.

Also, one other tract and lot of land containing three quarters of an acre, more or less, bounded as follows, viz. beginning at a stake and stones by Battery street, by the northwesterly corner of the lot of land last described, thence running southeasterly by the same lot of land to low-water mark; thence running northeasterly, ninety seven feet, by low-water mark; thence running northwesterly on a straight line to a stake and stones by Battery street aforesaid; thence southwesterly by the same street to the stake and stones first mentioned, which same tract of land we do on our oaths aforesaid, appraise and value at five hundred dollars and no more.

Also, one other lot of land, containing one acre and one quarter, more or less, bounded as follows, viz. beginning at a stake and stones at the northwesterly corner of the lot of land last described, thence running northeasterly by said Battery street to land of John Larkin; thence running southeasterly by land of said Larkin to low-water mark; thence southwesterly by low-water mark to the piece and lot of land last described; thence northwesterly by the same lot of land to the stake and stones first mentioned, which same lot of land we do appraise and value on our oaths aforesaid, at the sum of seven hundred and eighty seven dollars and no more.

In witness whereof we have hereunto set our hands and seals the day and year aforesaid, Roger Brown, (and seal) George Minot, (and seal) Jonathan Porter, (and seal) Abijah Thompson, Jr. (and seal) William Merriam, (and seal) John Walton, (and seal) Josiah Moore, (and seal) Nathaniel Hall, (and seal) Samuel Jaques, (and seal) Edward Wade, (and seal) Bernard Green, (and seal) Nathan Parker, (and seal.)

The foregoing is a true copy of the verdict of the Jury summoned by the Sheriff of the county of Middlesex, by virtue of a warrant to him directed, which issued from the Court of Sessions for the county of Middlesex, on the application of Aaron Putnam, Agent

499.

for the United States, to appraise the value of certain lands taken for a Navy and Dock Yard in Charlestown for the United States, which lands belonged to John Harris of said Charlestown.—Which verdict is annexed to said warrant and on file, with the files of said Court of Sessions for September Term, 1800.

Attest, A. BIGLOW, *Clerk.*

Clerk's Office, Cambridge,
October 27, 1830.

The street called Battery street in the foregoing description is now called Water street.

It appears from the aforegoing description, that such part of the street as was given up to said Harris, by the town, by the award of the referees, on the 25th of July, 1796, was included in the transfer to the United States and paid for by them.

That on the fourteenth day of January, 1801, a committee of the town of Charlestown appointed to consider the subject of granting or exchanging the roads and streets, for the accommodation of the Navy and Dock Yard, having conferred with the Agent of the United States, and examined the land, particularly located for that purpose, made a report, which was adopted by the town and is as follows, "That in consideration of the benefit expected from so important an establishment, such parts of the following streets and passage ways, belonging to the town as are included in the limits of the Navy and Dock Yard, be granted for the sole use of the United States, and that their termination from the Main street be as follows. The street laid through the land lately belonging to Mr. John Harris, by a line across the same from the easterly bounds of the land of Capt. Thomas Edes. The Wapping and Battery streets by a line across the same, on the easterly bounds of a passage way, 21 feet wide, belonging to the town, which leads to low-water mark. The road leading to Moulton's Point by a line across the same from the northerly bounds of the land lately belonging to Aaron Putnam, Esq. Provided, however, that if the Navy and Dock Yard should be discontinued

or the land converted by the United States to private uses, these grants shall be void, and the aforesaid streets and passage ways shall be opened as before for the use and accommodation of the town.

John Harris requested an entry of his protest to the report on account of his right to the advantages of the said streets.

That from and after the passing of the foregoing vote the two streets marked on the said plan, so far as the same are contained within the limits of said Navy Yard, were, and have been discontinued, and have ceased to be used as public highways, and have been used as a part of the Navy Yard.

That at the time the United States took the land of John Harris, there were three wooden buildings on lot No. 2, and no buildings on the other lots.

That said John Harris at that time, owned a small gore of land adjoining the west end of Lot No. 2, which was sold by his administrators to Commodore Hull in 1817 and afterwards sold by said Hull to the United States. The same gore of land is now enclosed within the walls of the Navy Yard.

That the town of Charlestown on the 2d March, 1801, sold to Aaron Putnam a part of the road leading to the brick-yards, which said Putnam afterwards on the 2d of April 1801, sold to the United States, and it is now within the limits of the Navy Yard.

That said John Harris died on the 19th of October 1804, (having devised all his real estate to his brothers, Thomas Harris and Jonathan Harris, who together with a neice, to whom said John gave an annuity, were the heirs at Law of said John) never having made an entry on the land covered by said streets, nor did the said Thomas or Jonathan ever enter therein.

That said Thomas Harris died on of June, 1814, intestate and his estate descended to his children, Thomas Harris, John Harris, Mary Coleman.

That said Jonathan Harris died on the 14th day of August 1814, intestate, and his estate descended

to his children, Samuel D. Harris, Richard D. Harris, Charles Harris, Henry Harris, Mary Harris, Charlotte Harris, and Augusta Harris, and that the said Charlotte and Augusta were infants within the age of twenty one years, at the time of the decease of the said Jonathan, and the other children of said Jonathan, were of full age, at the time of his decease. That the heirs of said Jonathan and Thomas Harris claim to hold said two parcels of land, described in the writ, as tenants in common, and that the said Richard for himself, and the other heirs of said Jonathan, and the heirs of said Thomas abovementioned, made an entry into said two parcels of land on the 4th September 1830, claiming title to the soil and freehold thereof, but have been constantly repulsed and kept out of possession by the Officers of the United States in command of the Navy Yard and particularly at the time of the trespass complained of in this action by the present defendant the Commandant of the Navy Yard. A similar entry was made on the 11th September 1833 which was repulsed in the same manner.

An Act for widening and amending the Streets, Lanes and Squares, in that part of the town of Charlestown, which was lately laid waste by fire.

Whereas great desolation and destruction was some time since made by the Brtitish troops in Charlestown, wantonly destroying the same by fire. And whereas a committee was appointed by the town aforesaid for regulating the streets, lanes and squares in that part of the town which was so laid waste, and the committee hath accordingly proceeded to lay out the same; a plan whereof hath been laid before this Court, and is now deposited in the Secretary's office:

Sec. 1. *Be it therefore enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same,* That the said proceedings of the Committee be, and are hereby confirmed; and all actions that shall be

brought for recovering possession of any land lying within any of the streets, lanes, squares, &c. laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and forever barred.

SEC. 2. *And be it further enacted, by the authority aforesaid,* That no building whatsoever be so erected as to encroach upon any street, lane or square by them laid out as aforesaid; and that every building so erected be deemed a nuisance and be accordingly taken down or removed by the order of any two Justices for the County of Middlesex, or the Selectmen of Charlestown, the charge of such removal to be paid out of the monies which shall be raised by the sale of the materials of such building, which by the order of said Justices or Selectmen, shall be sold for that purpose, unless the said charges shall be immediately paid by the owner.

SEC. 3. *And be it further enacted by the authority aforesaid,* That if any person or persons whatsoever shall wittingly or willingly, without good authority pluck up or remove any of the stakes or boundmarks which have been or shall be fixed or set up by said Committee, to distinguish and ascertain the streets aforesaid, and shall be thereof convicted before any Justice of the Peace for the county of Middlesex, each and every person so offending shall forfeit and pay the sum of forty shillings, for the use of said town, or on failure thereof shall suffer imprisonment for the space of two months.— And whereas some persons may suffer damage by laying out the streets, &c. according to the plan aforesaid, and others may receive benefit and advantage thereby.

SEC. 4. *Be it further enacted by the authority aforesaid,* That the value of all lands and buildings and other materials taken from any person by virtue of this act, shall be determined by three persons mutually chosen for that purpose, one of which shall be appointed by the Selectmen, or a Committee chosen for that purpose, which person so appointed by the selectmen or committee, shall not

be an inhabitant of the town, and the other by the party interested in the land, which two shall choose a third and the judgment of the three persons, or any two of them so chosen shall be final in the case, and the town held and obliged to pay to the person interested in the land, buildings, or materials aforesaid, the sum at which it may be appraised as aforesaid.

Sec. 5. *And be it further enacted by the authority aforesaid*, That in any case, where the whole of any person's land may not be taken away by the plan aforesaid, the appraisers aforementioned in estimating the sum said person shall receive, shall consider the advantage his remaining land receives, as well as the value of land taken from him by the plan aforesaid, and from a consideration of all circumstances, determine the sum of money such person shall receive as aforesaid.

And whereas some estates may be advantaged and rendered more valuable by the execution of the plan aforesaid,

Sec. 6. *Be it therefore enacted by the authority aforesaid*, That the Selectmen or a Committee appointed by the town for that purpose shall have power to call upon all persons whose estates (in their opinion) are benefitted by the execution of the plan aforesaid, to join in the appointment of appraisers in the manner before provided in this Act, for estimating damages as aforesaid; which appraisers shall have full power and authority to determine the sum that the owner of any estate so benefitted ought to pay; which estate shall be subjected to make good the sum so awarded by the appraisers aforesaid.

And whereas the house lots of Richard Devens, Esq. and Messieurs Ebenezer Breed and Jonathan Penny, are taken away by the plan aforesaid:

Sec. 7. *Be it further enacted, by the authority aforesaid*, That the Selectmen of the town aforesaid, or a Committee appointed by the town for that purpose, shall be held and obliged to procure good and sufficient house lots for said Richard Devens, Eben-

ezer Breed and Jonathan Penny, which in the opinion of appraisers to be chosen as is before provided by this Act, shall be equal in value and convenience to those taken away as aforesaid. And when said house lots are procured for the persons aforesaid, then their lots and buildings shall be under the same rules and regulations as to moving the buildings thereon, as is before provided by this Act for removing and preventing incumbrances and nuisances.

And whereas some persons in order to defeat the good purposes designed by this Act, may refuse or neglect to join in the appointment of appraisers, as is before herein provided:

Sec. 8. *Be it further enacted by the authority aforesaid*, That if any person or persons shall, after being duly notified thereof by the Selectmen of the town, (or a Committee appointed for that purpose,) refuse or neglect to join in the appointment of appraisers as aforesaid, then it shall and may be lawful for the Selectmen or Committee aforesaid, to apply to any two Justices of the Peace in the town of Boston, which two Justices shall upon such application notify the party so refusing or neglecting, and after such notice duly given, the said two Justices shall have full power and authority to appoint any three freeholders of the town of Boston, who shall have the same power and authority in valuing any piece of land; and all persons shall be as fully bound thereby as though the parties had joined in the appointment.

And whereas the inhabitants of the town of Charlestown, are, by reason of their losses in this present war, so reduced in their circumstances as to be rendered unable, without the assistance and encouragement of the public, to carry said plan into execution:

Sec. 9. *Be it further enacted, by the authority aforesaid*, That from and after the passing of this Act, there shall be allowed and paid out of the public treasury of this Commonwealth, to the Honorable Nathaniel Gorham, Esq., Thomas Russel, Esq. and Mr. David Wood, Jun., or the survivor of them one half of all the taxes paid by the town of Charlestown, for the space

of seven years, to be applied to the purposes before mentioned.

SEC. 10. *And be it further enacted*, That the Treasurer of this Commonwealth be, and hereby is, directed to pay into the hands of the said Nathaniel Gorham, Thomas Russel and David Wood, Jun., or the survivor of them, one half of all the taxes laid upon said town for the purposes aforesaid.

(This Act passed October 30, 1781.)

An Act authorizing the United States to purchase a certain tract of land in Charlestown, for a Navy Yard.

SEC. 1. *Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same*, That the consent of this Commonwealth be, and hereby is, granted to the United States, to purchase a tract of land situated in the northeasterly part of the town of Charlestown, in the county of Middlesex, adjoining and bounded on two sides by Charles and Mystic Rivers, not exceeding sixty-five acres, exclusive of flats, for the purpose of a navy or dock yard, or both of them, and erecting magazines, arsenals, and other needful buildings. The evidence of the purchases aforesaid, to be entered and recorded in the Registry of Deeds in the said county of Middlesex. Provided always, and the consent aforesaid is granted upon the express condition, that this Commonwealth shall retain a concurrent jurisdiction with the United States, in and over the tract of land aforesaid, so far as that all civil, and such criminal, processes as may issue, under the authority of this Commonwealth, against any person or persons charged with crimes committed without the said tract of land, may be executed therein, in the same way and manner as though this consent had not been granted.

SEC. 2. *And be it further enacted*, That if the agent or agents employed for the United States, and the owner or owners of said tract of land so to be purchased, cannot agree in the sale and purchase thereof, such agent or agents may apply to any court of Gen-

eral Sessions of the Peace, which shall be holden within and for the aforesaid county of Middlesex; which court, after due notice given to the said owner or owners, are hereby empowered and directed to hear, and finally determine the value of the same tract of land, or any part or portion thereof, by a jury, under oath, to be summoned by a sheriff or his deputy for that purpose, or by a committee of three persons, if the parties aforesaid can agree upon them; and the value thereof being thus ascertained by the verdict of such jury, or the report of such committee, who are also to be under oath faithfully and impartially to value said tract of land, or any portion of the same; and such verdict or report being accepted and recorded by said court, and the amount thereof being paid or tendered to the owner or owners of said tract of land, or to the owner or owners of any part of said tract of land, that shall have been thus valued, with his or her reasonable costs; the said tract of land, or such parts of the same as shall be thus valued, shall forever be vested in the United States, and shall and may be by them taken, possessed and appropriated to the purposes aforesaid.

Circuit Court of the United States, First Circuit, Massachusetts District, October Term, 1834.

RICHARD D. HARRIS & als. Plaintiffs,
versus,
JESSE D. ELLIOT.

Upon the trial and statement of facts in this cause, the following questions occurred, on which the opinions of the Judges were opposed, and thereupon it was ordered by the Court, on motion of William Minot, of Counsel for the Plaintiffs, that the points on which the disagreement happened should be certified to the Supreme Court for their decision.

1. Whether the soil and freehold of the street called Henly or Meeting House street and of the street called Battery or Water street did or did not pass to the United States, under and by virtue of the term appurtenances, used by the Jury in their verdict in the de-

scription of the Lot, No. 2, or by the description in said verdict of Lots, No. 1 and 3, or by the proceedings by which the land was taken by the United States.

2. Whether the limitations contained in said statute of October 30, 1781, is a bar to the Plaintiff's right to recover the soil and freehold of said streets.

3. Whether upon the discontinuance of a highway in Massachusetts, by the public, the soil and freehold of such highway reverts to the owner of the land taken for such highway.

4. And upon the facts above stated whether the Plaintiffs have any right or title to the land taken for said streets, in which the trespass is supposed to have been committed, and can maintain their said action.

Signed, WILLIAM MINOT,
of Counsel for Plaintiffs.
A. DUNLAP, *Defendant.*

Argument for the Plaintiffs, on the points reserved.

FIRST POINT.

"Whether the soil and freehold of the street called "Henley or Meeting House street, and of the street "called Battery or Water street, did or did not pass to "the United States, under and by virtue of the term "appurtenances used by the Jury in their verdict in the "description of the Lot, No. 2, or by the description "in said verdict of Lots, No. 1 and No. 3, or by the "proceedings by which the land was taken by the "United States."

By the 2d Section of the Massachusetts Statute, of June 17, 1800, authorising the purchase of the Navy Yard, it is provided, that if the agent of the United States and the owner of the land cannot agree, in the sale and purchase, the land may be taken by the United States and valued by a Jury.

John Harris did not agree to the sale, and the land was taken under the Statute, by the agent of the United States: the transfer was therefore *in invitum*, and Harris cannot be considered as having made a voluntary conveyance of it. Before Meeting House and

Water streets were laid out, said Harris owned all the land from the lane leading to the Brick Yards to low water mark. In 1800 these streets had been laid out and the Jury valued the land in distinct parcels.

The Verdict finds, that the Jury were shewn *several* lots of land, and that they had set out these lots by metes and bounds. If the United States meant to take the whole land of said Harris, including what was covered by streets, it is not easy to conjecture why the Jury should have valued it in separate lots; no advantage could result to either party from this valuation. The Statute does not require that the land should be set out by metes and bounds; and all that could have been necessary was to describe the land, with reasonable certainty, so that it should appear, that it was within the limits allowed for the purchase.

But, in fact, the Jury did not take the whole of Mr. Harris' land: they left a small Gore adjoining the lot, No. 2, which his administrators sold to Commodore Hull, and which he sold to the United States, and said Gore is now within the precincts of the Navy Yard.

It is inferred that the Jury did not intend to include, and did not in fact include, the soil and freehold of the streets as parts of the land taken and valued by them, from the following facts and reasons.

1. The Jury describe the several lots as they were enclosed, by fences, running completely round them, and where they were bounded by streets, describing them, as running *on* or *by the streets*, and thereby excluding the streets. In fact a map of the lots, could not afford a more perfect or definite description, than the Jury give.

The only doubt which has been suggested, whether the streets are excluded, arises from the use of the word *appurtenances* in the description of the 2d Lot. It was argued in the Court below, that if the term appurtenances carried the two streets, on which the 2d Lot was bounded, it would give all the streets, of which said Harris owned the soil, but this is an error in fact.

Water or Battery street, extends from the east end of Lot, No. 2, to a point marked B, on the southeast

corner of Lot, No. 1, a distance of more than 300 feet, and for that distance, it cannot be pretended that the soil of the street can be affected, by any construction of the term appurtenances, as used in the description of Lot, No. 2.

2. It appears from the statement of facts, that there were buildings on Lot, No. 2, and no buildings on the other lots. This was probably the reason, why the Jury distinguished this lot from the others. The term appurtenances is often used in common parlance, to mean *buildings*. There was something on this lot which gave it an additional value above the others. Persons unskilled in conveyancing are apt to consider some notice of buildings as proper in a deed of land. It is apparent, that there is no technical nicety in any part of the proceedings. The United States agent, Mr. Putnam, was not a lawyer, and it would appear from his petition, as well as from other parts of the proceedings, that he did not employ counsel.

3. If the Jury intended to include the streets under the term appurtenances in the 2d lot, why did they not use the same term, in describing the other lots? Lot, No. 1, is wholly surrounded by streets and it is reasonable to suppose that if they intended to give the streets, they would have done it, most especially in describing No. 1. These streets were as important to the Navy Yard as those adjoining the other lots.

4. There is no award of the value of the streets in the Verdict. As said Harris did not make a voluntary sale, the Jury were bound to value all they took from him.

5. On the north side of Lot, No. 1, is the road leading to the brick yards (which is one of the roads discontinued by the town.) This road, or a part of it, was sold by the town to Aaron Putnam, by deed, dated, March 25, 1801, in consideration of said Putnam's agreeing to make a new road, north of the old road.

The road thus conveyed by the town to said Putnam, he conveyed (with other land) to the United States, on the 2d April, 1801. From these transactions, it is inferred that Putnam, the agent of the United States,

did not consider the soil of the streets as taken by the Jury.

6. When the United States took the land from said Harris the streets were public highways and the soil was of little value to said Harris, *to sell* incumbered as it was with the easement; nor could he make any valuable use of it, until the easement was discontinued.

7. The protest of said Harris, made in public Town Meeting, is evidence that he did not believe the soil of the streets had been set off by the Jury, and that he considered himself as possessing an interest of some value in the streets.

It was contended by the defendant, at the trial, that in the construction of devises, though lands will not pass under the term "appurtenances," taken in its strict technical sense, yet they will pass if it appears that a larger sense was intended to be given to it.

But the authority of the maxim that land cannot be appurtenant to land, is not impaired by late authorities. It is recognized in Leonard v. White, 7 Mass. R. 6. Doane v. Broadstreet Corp. 6 Mass. R. 332.

It must be a very manifest intention of the testator, to be drawn from the will itself, which will induce the court to take the word *appurtenances* in its larger sense. Several authorities on this point are collected in a note to Smith and al. v. Martin, 2 Saund. 400.

In Leonard v. White, 7 Mass. R. 6, it is decided that a deed conveying a lot of land, with a mill on it, "with the privileges and appurtenances thereto belonging," did not pass the soil of a way leading from the road to the mill, though the easement might pass, as appurtenant to the land conveyed.

Jackson v. Hathaway, 15 John. R. 447. Where a person over whose land a highway is laid, sells the land on each side of the highway, by such a description as does not include the road or any part of it, the soil of the highway does not pass to the grantee; as it is excluded by the description of the land granted, and cannot pass as an incident, though the deed contain the usual sweeping clause of all right, title, interest, &c.

In Tyler v. Hammond, 11 Pickering, 193. The defendant held a lot of land, granted with an exact description of all the boundary lines. The deed contained a sweeping clause, under which the defendant claimed the soil in the adjoining highway, but the court held that the particular description controlled the sweeping clause in the deed, and that the highway did not pass as an incident or appurtenant.

SECOND POINT.

"Whether the limitation contained in said Statute "of October 30th, 1781, is a bar to the Plaintiff's "right to recover the soil and freehold of said streets."

From the whole of the Statute, it is obvious that the Legislature intended to conform the acts of the Committee, as nearly as their doings would permit, to regular proceedings under the existing Statutes relating to highways, and also to provide an equitable contribution from estates not taken for highways, on account of the advantage derived to such estates, by laying out streets in their vicinity.

It appears from the Preamble, that the town of Charlestown was desolated and destroyed by the events of the war. An effort was made in 1780 to recover it, to restore order and regularity to the streets and enable its inhabitants to rebuild their houses on a uniform plan.

The Preamble states, that a committee was appointed by the town "for regulating the streets, lanes and "squares, in that part of the town which was so laid "waste, and the Committee has accordingly proceed-"ed to lay out the same."

The Committee being appointed by the *town*, had no power under the existing laws, to lay out streets; that power being vested in the Selectmen personally, or "such persons as they shall appoint," and subject to the ratification of the inhabitants in town-meeting, but the Committee of the town had no power to regulate the streets. Their object was to ascertain the lines of the streets (in that part of the town, which

had been laid waste,) which were obliterated by the destruction of buildings, &c. In doing this, the Committee were liable to error by including within the lines of streets, lands not before included.

The business of the Committee was to regulate (which in this connexion must mean to restore to order and the former condition) the streets, and the "Committee accordingly proceeded to lay out the same." Here is no suggestion that any act had been done, affecting the right to the soil, but only that the streets had been regulated, and laid out; proceedings, which do not necessarily or usually touch the freehold.

It is presumed that the town discovered that the Committee had transcended their powers, and it became necessary to apply to the Legislature to confirm their doings. What the proceedings of the Committee were, appears from the Preamble. They had regulated and laid out highways—If their proceedings had been regular, no confirmation was necessary.

Wherein were they irregular? The Committee was irregular in its creation. A Committee so appointed, having no power by law to lay out highways, all its acts were void. It is gratuitous to suppose that the irregularity was in taking the soil for highways, since we prove an actual irregularity, which could be cured by the power of the Legislature only.

It was no advantage to the town to have the fee of the highways, nor is it to be presumed that the Legislature would give to Charlestown more than it gave to any other town in the Commonwealth.

The first section of the act confirms the proceedings of the Committee and bars actions for possession or damages. This section places the owner of the land in the same situation, as he stood by the existing highway statutes, except that he cannot question the regularity of the taking by the Committee, as he might an irregular taking under the highway statutes. When land is regularly taken for a highway, *no action for possession or for damages* can be maintained by the owner. His only remedy is by petition, &c. Stat. of Mass. 1786, ch. 67.

This statute was intended to make the proceedings of this Committee equivalent to highway statute proceedings and nothing more.

The preamble to 4th section, says, "that whereas some persons may suffer damage by laying out the streets," &c. This is the language used in the highway statutes. "Damages by laying out," &c is surely not descriptive of the loss of the freehold. It is used to express the value of the easement taken by the public.

The common law, which preserves the freehold of a road to the owner of the land, was early adopted in Massachusetts, and it is not easy to conjecture any reason why the Legislature should alter the law in this particular instance, (and there is no similar instance since the settlement of the country,) or why the town of Charlestown should desire to possess the freehold of the roads, when the easement was just as valuable to them. The town was at that time so poor as to command the charity of the General Court, and can it be believed that it would prefer to take the fee of the highways and thereby incur a greater expense than if the easement only was taken?

But the Plaintiffs insist that the Defendant's construction of the operation of the act of 1781 cannot be correct, because such an operation would infringe the Constitution of Massachusetts: which provides, (in 10th section Declaration of Rights,) "that whenever the public exigences require that the property "of any individual should be appropriated to public "uses, he shall receive a reasonable compensation "therefor."

The public exigences require that highways should be established and they are provided to be laid out and a reasonable compensation is provided by a series of statutes enacted very early after the settlement of the country, altered and continued to the present time. But it is only a public exigency which justifies the appropriation of the property of an individual to public uses. No such exigency existed in the case at bar. The appropriation of the freehold of a road to the pub-

lic was wholly unnecessary and totally worthless. It is true that the statute provides a compensation in this case, but from the language used "damages for taking" being the same as used in highway statutes, it may be inferred that the Legislature intended damages for the easement only. It cannot be presumed that the Legislature intended unnecessarily to violate private property or to depart from the usual course of legislation on similar subjects; and in the absence of any manifest intention in the statute itself, to take the freehold of the streets, as well as from the uselessness to the town of such a proceeding, it is manifest that the Legislature have adhered to the usual course of legislation on the subject of highways, and have given to the town all that it was needful for it to possess, without unnecessarily violating the property of an individual.

It may be said that John Harris has given validity to an illegal act by accepting a compensation.

The reply is, that he had a right to compensation for the easement; that what he received was accepted by him for the value of the easement, and this is apparent from his protest at the surrender of the streets to the Navy Yard, "on account of his right to the ad-"vantages of the streets."

But it is doubted whether the laying out of Water or Battery street and Meeting House street, is affected by the operation of this statute.

The language of the statute is restrospective. It confirms the past proceedings of the Committee. It speaks of lands taken away by the plan. The streets in question were laid out up to the present line of the Navy Yard in 1781, but were not carried into the land now occupied by the Navy Yard, until 1796 and 1799, and the land now claimed by the Heirs of John Harris was not taken from him till 1796 and 1799. The streets were not laid through the Navy Yard in 1781. There was no taking of Harris' land at that time and there could be no damages before taking. The referees in 1796 speak of a street proposed to lead to the Meeting House, "but not yet opened."

Can the Statute of 1781, confirming past proceedings, bar an action for an act done in 1796? Harris had sustained no damage in 1781. Nothing was taken from him, he had the vesture and herbage and all other profits of the land till 1796.

It will be seen by reference to the statement of facts that the town of Charlestown sold Back lane, one of the streets in the Navy Yard not laid out by the town's Committee in 1781, and upon which that act could have no operation. From this fact it appears that the town considered itself vested with the whole property in the streets by the mere act of laying them out and did not consider that property as derived from the act of 1781.

THIRD POINT.

"Whether upon the discontinuance of a highway by "the public in Massachusetts, the soil and freehold of "such highway reverts to the owner of the land taken "for such highway?"

It is the settled law of Massachusetts that by the location of a way over the land of any person, the public acquire an easement; but the soil and freehold remain in the owner although incumbered with a way, and if the way be discontinued he shall hold the land free from the incumbrance. This position is fully sustained by the decisions of the Supreme Court of Massachusetts, in Commonwealth v. Peters, 2 Mass. R. 127. Fairfield v. Williams & al. 4, 427. Perley v. Chandler, 6, 454. Alden v. Murdock, 13, 259. Stackpole v. Henley, 16, 33. Robbins v. Bowman & al. 18, 122.

On all the three points, the Plaintiffs refer to the opinion of Story, Justice, in the case of the United States v. Richard D. Harris, decided in the Circuit Court of Massachusetts, October Term, 1830.

WILLIAM MINOT,
of Counsel for the Plaintiffs.